pieces of land, viz. one-fifth share in E1998 and E3007 Mukim of Terachi, District of Kuala Pilah, Negri Sembilan.

The facts are as follows. One Yassin bin Bakar died on 6th January, 1958 leaving a sister the appellant, a son by a second wife the first respondent, and a daughter by a third wife the second respondent. At the time of his death the deceased was the registered proprietor of the said two pieces of land which he had acquired before he married his second wife.

The appellant renounced all claim in respect of the land comprised in E1998, Mukim of Terachi. She however claimed the whole of the land comprised in E3007 as it was acquired by the deceased during his marriage to his first wife whom he had divorced. In effect, she claimed distribution of the estate according to the customary rule. An unsatisfactory feature of this case is the rather perfunctory manner in which it was dealt with by the "Trial Collector". Hearsay evidence was admitted and there is nothing in the record to indicate that the parties were given an opportunity for cross-examination. No attempt appeared to have been made to call witnesses who might be able to give evidence regarding the local customary rule, if any, governing the distribution of the estate. In proceedings under the Small Estates (Distribution) Ordinance, 1955, the provisions of section 12 thereof should always be kept in view. The Collector made an order for the distribution of the land to the first and second respondents under the unvaried rules of the Muslim Law. The reason for the exclusion of the local customary rule was because the Collector held that the land is "not customary land". The meagre grounds of judgment do not show how he arrived at such a conclusion, whether it was because of the absence of the indorsement "customary land" on the title or whether it was as a result of an enquiry under section 4 of the Customary Tenure Enactment, Cap. 215. It is not necessary for the purpose of this appeal to go into this question because in the case of non-customary lands the legal position is, in my view, correctly set out by Cussen J. in *Re Haji Mansur bin Duseh*[1], and followed by Horne J. in *Sali binti Haji Salleh* v. *Achik*[2]. The general effect of these two judgments is that the distribution of such lands is governed by the personal law of the deceased, and if it is proved in a particular case or if it is generally accepted in the district that the Muslim Law of descent is varied by local custom (adat), effect should be given to such custom (adat) as the personal law of the deceased. In the case of *Sali binti Haji Salleh* v. *Achik*, it was held that the fact that the title of the land is not indorsed "customary land" does not preclude the Collector from considering the personal law of the deceased which may be Muslim Law varied by local custom (adat).

In a later case *Haji Hussin* v. *Maheran*[3], it was held that notwithstanding a finding by the Collector under section 4 of the Customary Tenure Enactment, Cap. 215 that the land was not customary, it was still open to him to distribute the land in accordance with custom (adat).

The record in this case does not show if the Collector had considered the question of the personal law of the deceased and if local custom (adat) formed part of this personal law.

In the result I allow this appeal and the order of the Collector is set aside. The Collector is hereby directed to rehear Distribution Suit No. 200 of 1959 and to consider the personal law of the deceased and any local custom forming part thereof and for that purpose to require the attendance of all persons such as the *lembagas* who may be able to give evidence regarding any custom applicable to the estate of the deceased.

I make no order as to costs.

Appeal allowed.

P. GOVINDASAMY PILLAY & SONS LTD. v. LOK SENG CHAI & ORS.

[O.C.J. (Ismail Khan J.) March 30, 1961]

[Malacca — Civil Suit No. 7 of 1960]

Probate and Administration — Grant of letters of administration obtained but not extracted — Whether such person can be sued in representative capacity — Probate and Administration Ordinance (S.S. Cap. 51), ss.2 and 17.

In this case the issue was whether a person who has obtained an order from the Registrar for the grant of letters of administration to issue can be sued in a representative capacity before the grant is extracted by him for the purpose of enabling the liability of an intestate estate to be determined and paid out of the assets of the deceased. The plaintiffs' claim was against the first and second defendants as administratrix and administrator respectively of the estate of one Goh Tiong Tan, deceased, for damages for breach of contract and/or duty as common carrier and/or negligence in and about the carriage of goods. It was alleged that the plaintiffs entrusted certain goods to the deceased for conveyance by boat and the goods were lost during transit in blameworthy circumstances. The defence was *inter alia*, that the defendants have not been constituted the legal representatives of the deceased and cannot be sued in that capacity, and therefore the plaintiffs' action was incompetent and ought to be dismissed *in limine*.

Held: a person who has obtained a grant of letters of administration but who has not extracted such grant cannot be sued in a representative capacity. It is the grant under seal and not the order of the Court that grant should issue which confers status. *Chia Teck Liang* v. *Tan Soo Khiang* (1); *Meyappa Chetty* v. *Supramaniam Chetty* (3); *Ingall* v. *Moran* (4) followed. *Chia Foon Sian* v. *Lam Chew Fah* (2) disapproved. *Muthoo Karuppan Chitty* v. *Onan* (6) and *Ibrahim Sah* v. *Zahara Bee* (7) doubted.

Cases referred to:—

(1) *Chia Teck Liang* v. *Tan Soo Khiang* [1936] M.L.J. 185.

(2) *Chia Foon Sian* v. *Lam Chew Fah* [1955] M.L.J. 203.

(3) *Meyappa Chetty* v. *Supramaniam Chetty* [1916] 1 A.C. 603.

(4) *Ingall* v. *Moran* [1944] K.B. 160; [1944] 1 All E.R. 97.

(5) *Issar Singh* v. *Samund Singh* [1941] M.L.J. 28; [1941] M.L.J. Rep. 24.

(6) *Muthoo Karuppan Chitty* v. *Onan* (1912) 2 M.C. 36.

(7) *Ibrahim Sah* v. *Zahara Bee* (1936) 2 M.C. 130.

ACTION.

J. E. Lloyd for the plaintiffs.

H. B. Ball for the defendants.

Cur. Adv. Vult.

Ismail Khan J.: The issue raised before me is whether a person who has obtained an order from the Registrar for the grant of letters of administration to issue can be sued in a representative capacity before the grant is extracted by him for the purpose of enabling the liability of an intestate estate to be determined and paid out of the assets of the deceased.

The plaintiffs' claim is against the first and second defendants as administratrix and administrator respectively of the estate of one Goh Tiong Tan, deceased, for damages for breach of contract and/or duty as common carrier and/or negligence in and about the carriage of goods. It was alleged that the plaintiffs entrusted certain goods to the deceased for conveyance by boat and the goods were lost during transit in blameworthy circumstances.

The defence is, *inter alia*, that the defendants have not been constituted the legal representatives of the deceased and cannot be sued in that capacity. The plaintiffs' action was incompetent and ought to be dismissed *in limine*.

It is not in dispute that letters of administration to the estate were granted on 15th January, 1960, but that the grant had not been extracted. The action was commenced on 18th January, 1960.

Mr. Ball for the defendants relied on the case of *Chia Teck Liang* v. *Tan Soo Khiang*[1], where it was held by Mills J. that when a Court makes an order that letters of administration shall issue to the petitioner, such an order does not constitute a grant within the meaning of section 70 of the Johore Probate and Administration Enactment (No. 22). He contended that until the grant is extracted, the defendants have no *locus standi* as representatives and could not therefore be sued in a representative capacity so as to bind the estate by a judgment.

Mr. Lloyd for the plaintiffs contended that the defendants became the representatives of the deceased's estate as from 15th January, 1960, when the Court made an order that letters of administration do issue. He cited the case of *Chia Foon Sian & Anor.* v. *Lam Chew Fah & Anor.*[2], a Singapore case. In that case letters of administration were granted to the plaintiff on 19th September, 1947, but they were not extracted until 18th August, 1950. Whitton J. held that the plaintiff acquired the character of administrator on 19th September, 1947. According to the learned Judge, it is the order of the Court that grant should issue rather than the grant under seal which confers status. He also dealt with the judgment of Mills J. in the Johore case but sought to differentiate it on the ground of the difference in language between the words "grant the same under its seal" in section 70 of the Johore Probate and Administration Enactment and the words "a grant under the seal of the Court issuing the same" in section 2 of the Probate and Administration Ordinance (Straits Settlements) Cap. 51. Section 70 of the Johore Enactment is as follows :—

> " (i) Whenever it appears to the Court that letters of administration to the estate of a person deceased, with or without a copy of the will annexed, should be granted, the Court shall, upon an undertaking being given as required by sub-section (ii) hereof, grant the same under its seal in manner following: — .....".

There is no provision in the Probate and Administration Ordinance (Straits Settlements) Cap. 51 in language identical with section 70 of the Johore Enactment. Section 17 of the Probate and Administration Ordinance provides for the grant of letters of administration on the death of a person intestate, and section 2 thereof defines letters of administration as "a grant under the seal of the Court issuing the same...". With due respect to the learned Judge I do not see that, apart from the difference in terminology, there is any difference in the meaning of the words between the two sections. In my opinion the overriding words in both are the words "grant under seal" and they mean that when a Court makes a grant, what is contemplated is a grant under its seal, and until the grant is extracted the order of a Court that the letters of administration do issue is only a conditional order subject to the compliance by the petitioner with the further requirements as to the provision of two sureties to the administration bond or obtaining an order of the Court to dispense with such sureties, payment of estate duty, or obtaining a certificate of postponement thereof, and swearing the administration bond along with the sureties. It is indeed a direction not to issue grant until those conditions are fufilled. Further, in my view, the observations of the learned Judge to the effect that "in the light of these considerations it seems to me the right view is that it is the act of the Court (performed in Singapore in uncontested petitions by the Registrar) which confers upon an Administrator his capacity and title, and that while for various practical purposes it may be essential for the administrator to extract the grant this act does not itself confer status" are *obiter*, for his Lordship was merely concerned in that case with the validation of payments made to an *executor de son tort* who later was appointed administrator. There is a vast difference between instituting or defending an action *qua* administrator and validation of payments made to an *executor de son tort* by the latter obtaining a grant which subsequently regularises the payments. It is only upon extraction of grant that rights and liabilities of the intestate devolve

upon the administrator from the moment of the intestate's death.

I respectfully follow Lord Parker's observations in the case of *Meyappa Chetty* v. *Supramanian Chetty*[3], at page 609 quoted by the learned Judge. "An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant"; in my opinion, this also applies in the reverse. The representative capacity can only be proved by the production of the grant under seal or a certified copy thereof.

In my opinion, it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with a representative character and to have acquired a title to the estate. I am fortified in this view by the judgment of Scott L.J. in *Ingall* v. *Moran*[4], at page 164. In that case the plaintiff issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act, 1934. He purported to sue in a representative capacity as administrator of his son's estate. The writ was issued in September 1942, but the grant of letters of administration was not taken out until November. Scott L.J. in his judgment observed that "at the time of writ issued the plaintiff had no shadow of title to his son's surviving chose in action, in respect of which he purported to issue a writ . . . . The defendant could have demanded production of the non-existent letters of administration, and on the plaintiff's failure to produce them the action would, on the defendant's application, automatically have been struck out." It was held in that case that as no letters of administration were taken out at the date of the writ, the writ was a nullity from the beginning and that the subsequent grant of letters of administration did not operate retrospectively so as to validate the action.

The case of *Issar Singh* v. *Samund Singh*[5], provides a suitable analogy, for in that case it was held that until the grant of letters of administration obtained in any part of the British Dominions outside the Federated Malay States had been resealed, the administrator had no administrative capacity so far as the Federated Malay States were concerned. Howes J. said: "the plaint might just as well have been signed by a stranger to the intestate — the plaintiff having no more rights in the intestate's property in the Federated Malay States than a stranger". In this case the defendants to this action are as much strangers to the intestate's estate as the plaintiff in the case cited. I wish to make it clear, however, that different considerations would have applied in the case of a creditor of an intestate suing an *executor de son tort* as such.

Mr. Lloyd for the plaintiffs contended that the extraction of the grant of letters of administration is merely a ministerial act. I am not disposed to take that view for the simple reason that the question of the sufficiency of security which has to be provided before extraction of the grant of letters of administration falls within the ambit of judicial discretion. The order that the grant do issue is, as I said, only a conditional order. It is inchoate and has no force and effect until the conditions referred to are complied with and the grant issued under seal.

In the light of *Ingall* v. *Moran*, the decisions in the former Singapore cases (1) *Muthoo Karuppan Chitty* v. *Onan & Ors.*[6] (2) *Ibrahim Sah* v. *Zahara Bee*[7], are no longer of persuasive authority. In *Ibrahim Sah* v. *Zahara Bee* Adrian Clark J. held that if during the pendency of the proceedings the grant of letters of administration is extracted there is an *ex post facto* validation of the earlier defect — a proposition which was expressly dissented from by the Court of Appeal in *Ingall* v. *Moran* and other subsequent decisions. Hyndman-Jones C.J. pointed out in the case of *Muthoo Karuppan Chitty* v. *Onan & Ors.* that where letters of administration had been granted, but the petitioner had not extracted the letters, further proceedings should be stayed until such grant was extracted. That is exactly what Scott L.J. in *Ingall* v. *Moran* said could not be done.

I am also aware of the unreported judgment of Thorne J. in the case of *Re Haji Mohamed Amin*, deceased, Perak Administration Petition 94 of 1931, where he held that an action against an administrator before the extraction of the grant of letters of administration was valid. With great respect to the learned Judge, I am unable to concur with his opinion.

The action is dismissed with costs.

Action dismissed.

Solicitors: *Shearn Delamore & Co.; Allen, Gledhill & Ball.*

FOO KOK HUI v. SARASWATHY & ANOR.

[O.C.J. (Ambrose J.) September 28, 1960]

[Singapore — Suit No. 1185 of 1959]

Landlord and Tenant — "Domestic premises" — Part used as a shop house — "Building used . . . chiefly as a separate dwelling" — Control of Rent Ordinance, (Cap. 242), ss.2 and 16.

This was a claim for possession of ground floor premises. The premises in question were 78 ft. long; 23 ft. of the front portion were used as a sundry goods shop, and the remaining part was used as a dwelling. The question for determination was whether the premises in question were used chiefly as a separate dwelling.

Held: as 70% of the floor space was used as a dwelling, the premises were used chiefly as a separate dwelling, and therefore the first defendant was protected by section 16 of the Control of Rent Ordinance.

ACTION.

J. L. P. Harris for the plaintiff.

K. K. Bezboruah for the defendants.

Ambrose J.: This was a claim for possession of the ground floor premises known as No. 363,